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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1473

FELIPE MENDOZA ALVAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,
ALEX ORTMEIER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

Petitioner Felipe Mendoza Alvarez prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 20, 1979.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals appears in the Appendix hereto. The findings of fact and conclusions of the trial court also appear in the Appendix hereto.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals denying of the Petitioner's motion to recall mandate was entered on December 20, 1979. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether Respondent was guilty of negligence in the manner in which he approached Petitioner?

2. Whether the Trial Court erred in finding no negligence on the part of Respondents and dismissing Petitioner's Action pursuant to Rule 41(b)?

3. Whether the District Court and Circuit Court erred in applying South Carolina law to the present matter instead of the applicable

California law?

4. Whether the District Court and Ninth Circuit Court erred in failing to apply California law concerning negligence to the present matter?

5. Whether Respondent's conduct constituted negligence as a matter of law?

6. Whether Respondent was ever justified in drawing his firearm in the present matter?

7. Whether the District Court and Circuit Court are authorized to assert the Doctrine of Contributory Negligence in direct contravention to the laws of California?

8. Whether Respondent Patrolmen used reasonable force upon the person of the Petitioner in the present matter?

9. Whether the District Court and Circuit Court denied the Petitioner Due Process of law by failing to apply the appropriate law to the action herein?

10. Whether the District Court and Circuit Court denied Petitioner equal protection of the law by failing to apply the appropriate law to the action herein.

TITLE 28 U.S.C. Section 1346(b)

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death cuased by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

This case eminates from an appeal by Petitioner from a judgment entered by the United States District Court for the Southern District of California, dismissing Petitioner's case at the close of his evidence pursuant to Rule 41(b) of Federal Rules of Civil Procedure.

Petitioner testified that on May 5, 1973, he resided with his brother Melesio Mendoza in Arroyo Grande, California, which is approximately 300 miles from San Diego, California (R.T. p. 116, 143). He did not own an automobile and never owned one. Around 11:00 A.M. he received a telephone call on his brother's telephone from Tomas De La Torre and Rogelio Gallegos (R.T. p. 142), friends that he had known when he resided in Mexico (R.T. p. 115, 116, 117). They stated they were in San Diego at a certain hotel with De La Torre's wife and requested that he help them get to Santa Monica (R.T. p. 116, 118).

Petitioner asked to borrow his brother's vehicle, a 1970 4-door Impala Chevrolet (R.T. p. 118). He had approximately $40.00 - $45.00 in his possession at that time. He left that afternoon to pick up his friends (R.T. p. 119). He testified he was unfamiliar with the route from Arroyo Grande and got lost and had to request assistance in reaching San Diego and in locating the hotel (R.T. p. 121). He arrived there at approximately 6:00 - 7:00 P.M. (R.T. p. 119).

Upon arrival, instead of finding the three persons he expected, he found seven, all of whom he knew but some only slightly (R.T. p. 120). He was surprised to find that there were additional persons. They all departed for Santa Monica that evening.

Appellant testified that because of his unfamiliarity with the area and its freeways he became lost (R.T. p. 121, 152, 153) and had to stop to ascertain his location. Ultimately he saw a road sign indicating that he was headed towards El Centro and he thereupon turned and headed in a direction he thought would take him to Los Angeles (R.T. 154).

While he was driving back to what he thought was the direction of Los Angeles, he passed a parked border patrol vehicle which was on the opposite side of the road (R.T. p. 124, 156). The vehicle was on a roving border patrol and was parked at a location that they had utilized before (R.T. 118). The Border Patrol vehicle immediately came out of its location and turned its red light on after Appellant's car passed by (R.T. p. 124, 156). There was absolutely no testimony as to why the Border Patrol Agents stopped the vehicle and there was no indication that its occupants appeared to be of Mexican descent; or that the officers had observed any of the occupants in the vehicle or that anyone in the vehicle made any overt or suspicious movements.

Upon seeing the flashing red lights (R.T. p. 124) Petitioner noted that the persons in the car

appeared to be nervous (R.T. p. 157, 158). Appellant did not attempt to evade the Border Patrol but immediately pulled to the side of the road (R.T. p. 124). Upon stopping all of the occupants fled (R.T. p. 125). Appellant stated that he became frightened and when the occupants ran he suspected they were illegal aliens (R.T. p. 125, 150) and because he was scared he ran after them abandoning the vehicle.

Thereafter, the group became separated into two groups with the Petitioner and four others in one group and Rogelio De La Torre and his wife in a second group (R.T. p. 127).

They walked in the desert until 3:00 A.M. and then they lay down to sleep. Petitioner was awakened when he heard someone say they heard someone speaking English (R.T. p. 128).

At this point, the jeep being driven by Border Patrol Agent Ortmeier arrived on the scene. The Petitioner ran. He ran about a block and at that point Agent Ortmeier caught up with him in his jeep and stopped it some 10 feet away (R.T. p. 129, 131). He thereupon raised his hands (R.T. p. 131) and observed Agent Ortmeier exit the jeep and point to him with his hand (R.T. p. 130). He did not see a gun and did not see Agent Ortmeier stumble but felt a blow to his head when Ortmeier's 357 Magnum firearm discharged within a close proximity to his face.

After being shot the Petitioner was rushed to the hospital for emergency treatment. As a result of his being shot the Petitioner sustained a severe wound to the lower portion of his face which deformed him; removed a portion of his jaw, severed a portion of his tongue as well as creating other abnormalities in the mouth and caused the Petitioner to have a severe speech impediment. Ortmeier's weapon was discharged from such a close proximity that the Petitioner's face sustained powder burns.

At the time of the pursuit and shooting by Ortmeier, the Petitioner had not engaged in any criminal activiey other than being suspected of being an undocumented alien. At the time of the pursuit and shooting by Ortmeier the Petitioner was unarmed and never made any threatening gestures towards Agent Ortmeier. Agent Ortmeier ran up to the Petitioner and discharged his weapon for no apparent reason. Ortmeier contends that his firearm discharged accidentally when he stumbled.

Agent Ortmeier testified that he parked his vehicle 10 to 12 feet from where the Petitioner was hiding, and that the headlights from his jeep were illuminating the Appellant (R.T. p. 41).

He exited his vehicle and because he never saw the Petitioner's left side he drew his revolver (R.T. p. 45). He testified he did not intend to shoot him unless it became necessary in self-defense and that he never would have drawn his revolver if he had ever seen Petitioner's left hand

and seen that it was empty (R.T. p. 50). He further testified Petitioner was looking over his right shoulder and that he was running at the Petitioner and when he reached within 4 to 5 feet his .357 Magnum discharged when he stumbled.

As a result of the foregoing occurrences, the Petitioner filed a law suit against Ortmeier and the federal government on or about 1973.

On May 5, 1976 the trial in this action began and the Petitioner proceeded to put forth his case. On or about May 7, 1976 a the close of the Petitioner's evidence, the respondents moved to dismiss the Petitioner's case pursuant to Rule 41(b) of Federal Rules of Civil Procedure. Petitioner urged and argued that the evidence he had presented set forth a case in negligence.

The trial court granted Respondent's motion to dismiss under Rule 41(b) and in its indicated decision stated that it was so dismissing on the basis of United States v. Folk, 199 F.2d 889 (4th Cir., 1952) (R.T. p. 313 and 314), a South Carolina case setting forth contributory negligence as an absolute defense. (Also see Findings of Fact and Conclusion of Law, Clerk's Transcript, p. 121.)

Thereafter Appellant moved for a new trial or in the alternative, Motion for Amendment of Judgment.

The trial court affirmed its dismissal.

Immediately thereafter the Petitioner appealed his case to the United States Court of Appeals for the Ninth Circuit.

On or about September 6, 1979 in a 2 to 1 decision the Circuit Court affirmed the findings of the trial court.

On or about September 19, 1979 the Petitioner requested a rehearing.

On or about November 5, 1979 the rehearing was denied by the Circuit Court.

On or about November 28, 1979 Petitioner made a motion to recall mandate.

On or about December 20, 1979 Petitioner's motion to recall mandate was denied.

ARGUMENT

I

RESPONDENT ORTMEIER'S CONDUCT CONSTITUTED NEGLIGENCE AND THE CIRCUIT COURT ERRED IN HOLDING PLAINTIFF'S CASE WAS PROPERLY DISMISSED.

With regard to the present matter, it becomes increasingly apparent that the proper legal

construction of the defendant's conduct based on California law, is clearly that of negligence.

It will be recalled from the record that the evidence revealed at the trial indicated that defendant Border Patrolman Ortmeier, at the time of the incident in question, ran up to the Petitioner with his .357 Magnum gun drawn and cocked and discharged his weapon at a distance of no more than 3 feet from the Appellant. The Petitioner-Appellant was not armed and posed no danger to Ortmeier and Ortmeier did not manifest any apprehensive fear fear of bodily harm by his conduct.

A. RESPONDENT NEGLIGENTLY APPROACHED PETITIONER.

Even if Ortmeier accidently discharged his weapon, it is apparent that he was negligent and perhaps even reckless in the manner in which he approached the Appellant in this case. In the present matter he was pursuing and approaching a suspect who was only suspected of not possessing a green card which is only a civil violation. Ortmeier's conduct must be gauged in this context. Presently no pattern has been established wherein it has been found that undocumented aliens per se, whether they be from Europe, Asia or North or South America, are usually armed and present a reasonable basis for apprehension of bodily harm. Quite to the contrary, it is rare for undocumented aliens to present any kind of danger.

Furthermore, Ortmeier's naked assertion that he drew his weapon in self defense, without support from the total circumstances of the incident in question is wholly insufficient to sustain the Circuit Court of Appeals assertion that he used reasonable force in self-defense.

At no time were there any outward manifestations of danger which required him to defend himself.

Ortmeier never stated that he thought the Appellant was armed. He stated he did not know if the Petitioner was armed. However, it becomes inceasingly clear, that based on Ortmeier's conduct, that at the moment he discharged his weapon, he knew the Petitioner to be unarmed for he was running at the Petitioner at a distance of 4 feet. Ortmeier's overt conduct discloses that he was not the least bit apprehensive at the moment he discharged his weapon for he was not approaching the Appellant in a cautious manner.

In order for Ortmeier to maintain that he was apprehensive and that he was defending himself there must be articulatable and tangible facts and circumstances that would lead a reasonable man to act as Ortmeier did. In the matter of Vaughn v. Jonas, 31 Cal.2d 586, 600, 191 P.2d 432, 440, the Court held: "The force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury." In the present matter the circumstances do not support Ortmeier's action and there was never

any indication of an impending injury.

Negligently approaching a suspect has been held by the Supreme Court of California as the basis for liability even if there is a subsequent discharge of a weapon. This principle is set forth in the case of Grudt v. City of Los Angeles, 1 Cal. App. 3d 529, 81 Cal. Rptr. 465 (1969) 468 P. 2d 825 (1970) wherein police officers stopped and shot a motorist who they suspected of committing a crime. In the Grudt case the officers testified that they intentionally shot the suspect but nevertheless, the court held that the jury could have found that the officers were negligent in the manner in which they approached the suspect. In making its decision, the court stated:

> "At the very least, the evidence favorable to plaintiff raised a reasonable doubt as to whether Kelgo and Renehart acted in a manner consistent with their duty of due care when they originally decided to apprehend Grudt, when they approached his vehicle and shot him to death."

See also, Munoz v. City of Los Angeles, (July 17, 1979) 156 Cal. Rptr. 727, in which the California Supreme Court upheld the jury's finding that defendants negligently approached deceased and were therefore liable.

Therefore, in the present matter it is irrelevant whether Ortmeier discharged his weapon intentionally or accidentally in that he

was negligent in the manner in which he approached the Appellant immediately prior to the discharge of the weapon and that the negligent or reckless manner in which he approached the Petitioner was the proximate cause of the Petitioner's injuries. Clearly, Ortmeier's conduct in running at the Petitioner over difficult terrain with his weapon cocked and drawn under circumstances not creating apprehension of bodily harm at a point of 3 feet from Appellant who was stationary at the time, was not consistent with his duty of due care. It is foreseeable that a gun cocked could be discharged by running and that any weapon discharged at such a close range could strike the Petitioner and constitutes without question a recognizable risk.

Therefore, the defendant breached his duty of due care in approaching the Petitioner in such a careless manner and the principles involved in this case are consistent with those found in Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 86 Cal. Rptr. 465 and Munoz v. City of Los Angeles (July 17, 1979) 156 Cal. Rptr. 727 and the Circuit Court of Appeal therefore erred in upholding the trial court's ruling.

B. DEFENDANT'S CONDUCT CONSTITUTES NEGLIGENCE AS A MATTER OF LAW.

It is apparent that the force used by Ortmeier was sufficient to cause death had the Petitioner not received emergency treatment. Based on the

cases of Petersen v. City of Long Beach, 140 Cal.Rptr. 401, and Kortum v. Alkire (1977) 69 Cal.App.3d 325, 138 Cal.Rptr. 26, Ortmeier's conduct constitutes negligence as a matter of law for the cases of Petersen and Kortum hold that under California law, peace officers cannot use guns to effect the arrest of a felon unless the felony is of an atrocious nature or there are circumstances creating a reasonable apprehension of bodily harm. In view of the fact that Ortmeier had no reason to believe the Petitioner had committed a felony of any nature and the complete absence of circumstances creating an apprehension of bodily harm, it becomes a compelling conclusion that there exists no legal justification fot the defendant's conduct.

Nothing in the record suggests that the Appellant was involved in anything more than being an illegal alien or accompanying illegal aliens. The record clearly indicates that the Petitioner made no threatening gestures towards the defendant Ortmeier. The conduct of the Plaintiff-Petitioner can best be characterized as relatively innocuous and insufficient to warrant the force used by defendant.

In contrast, the suspected activity in the Petersen case was much more serious in that it involved the shooting of a fleeing burglary suspect by a police officer in his pursuit. At the time of the shooting, the burglary suspect was not armed and posed no threat to the officer in question. The court held, nevertheless, in that case, that it constitutes negligence as a matter

of law, for a police officer to use deadly force on a suspect fleeing when the shooting takes place without circumstances creating fear of bodily harm and where no atrocious or life endantering felony has been committed. It further places a police officer in the same position as a civilian for the purposes of establishing circumstances under which deadly type force can be used. Therefore, it is clear that Ortmeier held no special status to use his weapon as asserted by the District Court and affirmed by the Circuit Court of Appeals. Especially where no atrocious felony had been committed and where officer Ortmeier who ran at the stationary Appellant with his gun drawn at a distance of 4 feet manifested no fear of bodily harm.

It becomes increasingly apparent that, based on Petersen v. City of Long Beach (1979) 155 Cal.Rptr. 360 and Kortum v. Alkire (1977) 69 Cal.App.3d 325, 138 Cal.Rptr. 26, the state of the law in California is such that the courts will gauge the entire context of the defendant's conduct and not grant any special status or license to the use of his weapon, but quite to the contrary, impose a special duty in the use of firearms. Because his firearm was a deadly weapon, a special duty is imposed on Ortmeier by law as to the use and handling of his weapon under circumstances not creating fear of bodily harm and where no atrocious felony has been committed.

In essence, neither the law of California nor the record supports the finding of the District Court that the defendant was justified in drawing

his gun "in the line of duty" and that he "would have been derelict in his duties if he did not do so."

C. RESPONDENT ORTMEIER WAS NEVER JUSTIFIED IN DRAWING HIS WEAPON.

The defendants argued successfully before the District Court that defendant Ortmeier had drawn his gun to effect the arrest of a fleeing felon. However, the record is clear that Ortmeier did not have reasonable cause to believe the Petitioner had committed a felony. At most, the Appellant could only have been suspected of being an undocumented alien and clearly this is not a felony.

Time and again, the courts have held that in order to constitute "reasonable cause," there must exist such a state of facts and circumstances and onformation, known to the officer before the arrest, as would lead a person of ordinary judgment to entertain a strong suspicion that the person had committed a felony. People v. Kilvington, 104 Cal. 86; People v. Brute, 9 Cal. 2d 666; Rogers v. Superior Court, 46 Cal. 2d 3; People v. Edwards, 142 Cal. App. 2d 419.

Additionally, the question of the existence of reasonable cause is predicated on an objective test. Whether reasonable cause to make an arrest exists is determined by the facts known to the officer at

the time of arrest and is not dependent upon the officer's subjective good faith or his accuracy of his knowledge of the law of arrest, search or seizure. People v. Superior Court, 15 Cal. App. 3d 146, 92 Cal. Rptr. 916.

In the case of Cunha v. Superior Court, 2 Cal. 3d 352, 85 Cal. Rptr. 160, 466 P. 2d 704, the court held the following with regard to the element of reasonable cause:

> "To constitute probable cause for arrest, a state of facts must be known to the officer that would lead a man or ordinary care and prudence to believe or to entertain a strong suspicion, that the person arrested is guilty. As with any intrusion upon a person's personal security, simple good faith on the part of the arresting officer is not enough, and in justifying the particular intrusion the police officer must be able to point to specific and articulatable facts which, taken together with rational inferences from those facts reasonably warrant his suspicion." (Terry v. Ohio (1968) 392 U.S. 1, 16, 19, 20 L. Ed. 2d 889, 902, 904, 905-906, 88 S. Ct. 1868)

In the present matter defendant Ortmeier never had any specific and articulatable facts that could connect the Appellant with the commission of a felony. At the very most, Ortmeier was relying on his subjective beliefs which were clearly

insufficient in view of the foregoing cases.

Nevertheless, the District Court found that he was trying to apprehend a fleeing felon and was justified in drawing his weapon to do so. This is clearly erroneous due to the missing element of reasonable cause to believe the Appellant had committed a felony.

The District Court also erroneously found that the defendant was justified in drawing his weapon for self-protection. This clearly is not supported by the record in that there were never any overt threats or gestures on the part of the appellant of any kind.

When Ortmeier drew his gun, Petitioner was fleeing from him. According to Ortmeier's own testimony, Appellant was running away with his back toward Ortmeier when Ortmeier drew his weapon and left the jeep. The record does not support any inference or conclusion that Ortmeier was afraid that Mendoza-Alvarez would attack him at the time he drew his gun. Absolutely all there is in the record is Ortmeier's testimony that "if I would have seen his hands the first time I saw him and they would appear to be empty, I would never have drawn my gun." Ortmeier did not testify that he ever believed that Appellant had a weapon.

The majority opinion in the Circuit Court cited Vaughn v. Jonas, 31 Cal. 2d 586, 600, 191 P. 2d 432, 440 (1948); Boyer v. Waples, 206 Cal. App. 725, 727, 24 Cal. Rptr. 192, 194 (1962) in

support of Ortmeier's conduct and the District Court's findings. However, these cases do not support the defendant's position. Quite to the contrary they require overt acts and threatening gestures against the person defending himself that create a totality of circumstances causing a person to act to prevent impending injury.

For example, in Vaughn v. Jonas, supra, the plaintiff had threatened the defendant, had used profane language and at the moment he was shot was coming at the defendant with a weapon in the form of a rock.

In Boyer v. Waples a pattern existed where the plaintiff had constantly threatened and harassed the defendant and his family. The plaintiff had thrown a beer can through the defendant's window and would wake up the defendant's family with telephone calls and loud noises. Plaintiff had created by his conduct apprehension and fear on the part of defendant. At the time plaintiff was shot by defendant he was seen sneaking on to defendant's property and approaching defendant's house with an object believed by defendant to be a stick of dynamite.

The foregoing cases require specific and articulatable facts that create circumstances that lead a person to reasonably believe that an impending injury is forthcoming. They can be clearly contrasted with the present matter in which no threatening gestures were ever made and no such circumstances were ever created.

Ortmeier's statement that he drew his weapon for self-protection is meaningless without a totality of circumstances threatening him with harm or information that the Appellant had committed an atrocious felony.

Furthermore, Ortmeier never stated that he drew his weapon because he felt it necessary but that he drew it just in case it should become necessary. This reveals that at the time his weapon was discharged he did not feel it necessary to use it.

Ortmeier stated that he could not see the Petitioner's left side. Yet, at a distance of 4 feet he was not apprehensive and was running at the Appellant without caution. Ortmeier's conduct does not support any notion that the Petitioner could have been concealing a weapon. Obviously the Petitioner's hiding alone, could not be construed as a threatening gesture. Most likely, Ortmeier's statement about the position of the Appellant was established to justify the trajectory of the entry wound created by the bullet from Ortmeier's gun and was not intended and should not serve as a basis for creating apprehension on the part of Ortmeier.

Therefore, there is no basis in the record and clearly none in law to support the lower court's finding that Ortmeier drew his gun in self-defense.

Furthermore, Ortmeier's negligent conduct cannot be excused on the ground that the plaintiff

Petitioner Mendoza-Alvarez chose the terrain or the time of his flight as asserted by the majority opinion of the Circuit Court. This is just another way of claiming contributory negligence on the part of the plaintiff and contributory negligence has been long since not applicable in the State of California and has been replaced by comparative negligence. Li v. Yellow Cab Co. of California (1975) 13 Cal. 3d 804.

II

THE DECISIONS AND FINDINGS OF THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS ARE CLEARLY ERRONEOUS IN THAT THEY DO NOT APPLY THE LAW OF THE STATE OF CALIFORNIA.

The trial judge relied on the case of United States v. Folk, 199 F.2d 889 (4th Cir. 1952) in reaching his conclusion to dismiss plaintiff's complaint. The foregoing case was a South Carolina case and was applied even though all of the alleged activities and occurrences took place in the State of California.

It is a well established principle that liability is determined upon the basis of the law of the place where the act or omission complained of occurred. Mass. Bonding & Ins. Co. v. United States, 77 S.Ct. 186, 352 U.S. 128; 28 U.S.C. Section 1346(b). Nevertheless, the trial court used South Carolina Law to arrive at its

conclusion. Moreover, the Circuit Court never addressed itself to this error and incorporated the spirit and philosophy set forth in the lower court's ruling. In this regard, California law has not been followed.

The Folk case, herein cited and relied on by the Trial Court and adopted by the Circuit Court, is one where the thrust of the holding is based upon the Doctrine of Contributory Negligence. While it is time that the courts of one state may look to the decisions of the courts of other states for guidance when a question of law is unsettled, such is clearly not the case in this matter. The California Supreme Court, on April 24, 1975, rendered its en banc decision in the case of Li v. Yellow Cab Co. of California, 13 Cal. 3d 804, 119 Cal. Rptr. 858. It was held in the Li decision that:

> "The Doctrine of Contributory Negligence would be abrogated and the doctrine of comparative negligence in its pure form would be adopted."

That court further held that the rule expressed in Li "shall be applicable to all cases in which trial has not begun the date of this decision becomes final."

The record in the instant matter reflects that the trial began on May 6, 1976 which was more than a year after the Li decision. Therefore, it was clearly erroneous to apply a South Carolina case based on the doctrine of contributory negligence

to this case. By not addressing itself to this error, the Circuit Court has perpetuated it to the Appellant's prejudice.

The application of the Folk case, supra, to the present matter operates as a finding that Agent Ortmeier was not as much as one percent negligent in causing his gun to discharge into the face of the Appellant. This is a necessary conclusion by the majority holding because had Ortmeier been even slightly negligent, under the doctrine of Li v. Yellow Cab Co., supra, he would have been liable for whatever percentage of damage cuased by him.

The affirmance of the trial court's ruling is an affirmance of contributory negligence which was not applicable at the time of trial. Therefore improper law has been applied to this case and this is clearly erroneous.

It is interesting to note that although the Circuit Court maintains that the District Court's decision was not clearly erroneous, surely, it is clearly erroneous if it applies inapplicable South Carolina law instead of applicable California law.

It is further interesting to note that although the Circuit Court of Appeal cited California law in the form of Vaughn v. Jonas, 31 Cal. 3d 586, 600, 191 P. 2d 432, 440 (1948) and Boyer v. Waples, 206 Cal. App. 2d 725, 727, 24 Cal. Rptr. 192, 194 (1962), as a basis for supporting the lower court's findings, the legal principles and elements set forth in those cases have not been

applied to this case. As stated previously herein, those cases require a totality of circumstances including threats, gestures, weapons, conduct and action that make it reasonably appear necessary to use reasonable force to prevent an impending injury. In the present case there was never any evidence of gestures or threats on the part of the Petitioner and there was never any evidence that he was armed or that there was an impending injury forthcoming to the defendant Ortmeier. Had the Circuit Court in fact applied California law they would have found these elements to be totally absent.

It has already been shown that Ortmeier had no reason to draw his weapon, but once it was drawn he should have proceeded all the more cautiously. The failure to act with caution and due care when there was no need to act otherwise resulted in the Appellant's injuries. In Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 86 Cal. Rptr. 465, it was held that peace officers may be found negligent for the manner in which they approach a suspect. Munoz v. City of Los Angeles 156 Cal. Rptr. 727 confirms this holding. Yet, the principle set forth in Grudt was never applied to the present case.

The Circuit Court of Appeals also failed to apply the principles set forth in Petersen v. City of Long Beach (1979) 155 Cal. Rptr. 360 and Kortum v. Alkire (1977) 69 Cal. App. 3d 325, 138 Cal. Rptr. 26, which apply retroactively to all California cases under adjudication and which are in point with the issues presented in this matter. The Kortum case deals with Sections 196, 197,

835a and 837 of the California Penal Code and holds that deadly type force can only be used in the apprehending of atrocious felons. Therefore, clearly Agent Ortmeier had no reason or justification in law to draw his weapon on one merely suspected of being an undocumented alien.

In failing to apply California law to the present matter, and in upholding the Trial Court's decision that was based on South Carolina law, the decision of the Ninth Circuit Court of Appeals is clearly erroneous.

III

THE DECISIONS OF THE DISTRICT COURT AND CIRCUIT COURT OF APPEALS VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHTS IN THAT THEY DENY HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

As stated previously herein, both lower courts applied South Carolina law and the Doctrine of Contributory Negligence to this case and failed and refused to apply applicable California law even though it is a well established principle that liability is determined upon the basis of law of the place where the act or omission occurred. Mass. Bonding & Ins. Co. v. United States, 77 S. Ct. 186, 352 U.S. 128.

In so failing to apply the requisite applicable law, the decisions of the lower courts have denied the Petitioner his right to due process as guaranteed by the Constitution in that he has a right to have the proper law applied in his case. Myles Salt Co. v. Bd. Comm., 239 U.S. 478, 60 L.Ed. 392, 36 S.Ct. 204; Mass. Bonding & Ins. Co. v. United States, supra.

Furthermore, by singling out the Petitioner the courts have engaged in an unwarranted selectivity that has not been imposed on all individuals having their cases adjudicated. The courts have applied South Carolina law and have failed to apply applicable California law. This burden has not been imposed on everyone bringing action in California. There is no valid precedent for this misapplication of law. This burden was only imposed on the Petitioner. Therein lies the inequality and unfairness. Everyone should be held to the same standards of law. By singling out the Petitioner the lower courts have placed an uneven burden on him, and effectively denied him equal protection of the law. This constitutes a violation of the California Constitution and the Fourteenth Amendment to the United States Constitution. The law must be applied impartially to all the constitents of each class so that the law shall operate equally upon all persons in similar circumstances. See People v. Finley, 153 Cal. 59, 94 P.248 and In re Kotta, 187 Cal. 27, 200 P. 957; Myles Salt Co. v. Bd. Comm., supra and Mass. Bonding & Ins. Co. v. United States, supra.

It is a well established principle that the equal protection clause makes but one demand, that is that the laws must be executed and interpreted without unjust discrimination and rights should not be granted to one and denied to others under similar circumstances. Title Guarantee and Trust Co. v. Garret, 42 Cal. 152, 183 P. 470; Dooley v. Johnson, 133 Cal. 459, 24 P.2d 540.

Yet, by placing a special burden on the Petitioner the lower courts have violated his constitutional right to equal protection of the law.

CONCLUSION

In conclusion, it is respectfully urged that theDistrict Court and Circuit Court erroneously misapplied South Carolina law to a California case and failed to apply the applicable California law regarding negligence to this matter. In this regard they have also denied the Petitioner his right to Due Process and Equal Protection of the law.

For all the reasons stated herein it is respectfully urged that a Writ of Certiorari should issue to review the judgment and opinion of the District Court and the Court of Appeals for the Ninth Circuit and this case should be reversed and remanded for a new trial.

Respectfully submitted,

MANUEL LOPEZ
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
SEP 6 1979
Emil E. Melfi, Jr., Clerk
U. S. Court of Appeals

FELIPE MENDOZA ALVAREZ, Plaintiff-Appellant, vs. UNITED STATES OF AMERICA, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE BORDER PATROL, BORDER PATROL AGENT ORTMEIER, Defendants-Appellees.	)	No. 76-3432 MEMORANDUM

Appeal from the United States District Court
for the Southern District of California

Before: HUFSTEDLER and WALLACE, Circuit Judges, and WHELAN,* District Judge

Mendoza-Alvarez appeals from a judgment in favor of the government in his action brought pursuant to the Federal Tort Claims Act, 28 U. S. C. §§1346(b), 2671 et seq., seeking damages for

*Honorable Francis C. Whelan, United States District Judge, Central District of California, sitting by designation.

personal injuries he sustained when a Border Patrol agent accidentally shot him. We affirm.

About midnight on May 5, 1973, Border Patrol agent Ortmeier received a radio call that an automobile occupied by illegal aliens had been stopped on California State Highway S22 and that the aliens had fled into the desert. In response to the call, Ortmeier and other agents began an intensive search for the suspects. Three suspects were found and taken into custody. About 5:15 a.m., Agent Ortmeier discovered a second group of five persons lying under a large bush. Ortmeier identified himself as an immigration officer in both Spanish and English, and he ordered the suspects to surrender. Four persons remained where they were, but the fifth, Mendoza-Alvarez, ran away. Ortmeier pursued him in his jeep. The terrain was rough and rocky. Semi-darkness prevailed and it was too dark to make out shapes or objects at a distance of 100 yards.

During the pursuit, Mendoza-Alvarez stopped and tried to hide in a bush. Ortmeier could see his knees in the headlights. He stopped the jeep about 10 to 12 feet away from Mendoza-Alvarez, and alighted. When Ortmeier got out of the jeep, Mendoza-Alvarez ran away, along the passenger side of the jeep. While Ortmeier was running around the front of the jeep, he drew his gun. He testified that he drew the weapon for self-protection only, and that he intended to use it only if he were attacked with another weapon. Ortmeier also testified that Mendoza-Alvarez seemed to be trying to keep his left side away from Ortmeier. "If I would have seen his hands the first time I saw him and they would appear to be empty, I would have never drawn my gun."

Ortmeier further testified that he was running with the gun pointed upward at a 45-degree

angle. He testified that he stumbled while both he and Mendoza-Alvarez were running, and that the gun went off accidentally as he fell forward. At that time, Ortmeier was about four to five feet behind Mendoza-Alvarez. The gunshot caused serious injury to Mendoza-Alvarez's face and lower jaw.

At the conclusion of Mendoza-Alvarez's case-in-chief, the government moved for dismissal pursuant to Fed. R. Civ. P. 41(b). The district court granted the government's motion, finding that Ortmeier drew his gun "in the line of duty and for reasons of self-protection," and that he "acted reasonably in drawing his gun [when he did] and would have been derelict in his duties if he did not do so." The judge held that Mendoza-Alvarez had not carried his burden of proving negligence.

Mendoza-Alvarez asserts that the district court committed a number of alleged errors, each of which he believes require reversal. He claims that the district judge could not properly grant the government's motion made pursuant to Fed. R. Civ. P. 41(b), that the judge erred when he failed to find that the purported illegality of the original stop of the aliens on the highway removed the "cloak of police authority" from the Border Patrol agents, that the judge erred in not finding Border Patrol agent Ortmeier negligent, and that the judge also erred in failing to apply the doctrine of res ipsa loquitur. We conclude that none of Mendoza-Alvarez's asserted errors requires reversal.

Fed. R. Civ. P. 41(b) states in part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff . . . .

Thus, in a non-jury case, the district court may decide the case on the merits at the close of the plaintiff's case-in-chief. In doing so, the court is not required to view the evidence in the light most favorable to the plaintiff. Ellis v. Carter, 328 F.2d 573, 577 (9th Cir. 1964).

Mendoza-Alvarez contends that the government's introduction of the testimony of Tuffley during his case-in-chief, and the introduction of portions of his deposition after he had rested his case preclude the application of Rule 41(b). We cannot agree. The government called Tuffley to take up court time occasioned when one of Mendoza-Alvarez's witnesses failed to appear. The attorney representing Mendoza-Alvarez specifically stated he had no objection. The government read portions of Mendoza-Alvarez's deposition by way of impeachment while cross-examining him. At the close of Mendoza-Alvarez's case that part of his deposition was recieved in evidence at the government's request. Mendoza-Alvarez's only objection to the introduction of the pertinent portions of his deposition was based upon his presence at trial.

Under all these circumstances, the district judge was not required to treat the case as if both sides had presented their evidence. Certainly, the government had not presented its case. The government properly made its motion at the close of Mendoza-Alvarez's case, and the evidence may

properly be judged pursuant to Rule 41(b). Thus since the district judge was convinced from Mendoza-Alvarez's case that the evidence preponderated against him, the judge was empowered to grant the government's motion. See Ellis v. Carter, supra, 328 F.2d at 577.

We will not assume that the district judge improperly considered the testimony of the government witness without some suggestion of this in the record. The district judge based his ruling regarding Ortmeier's alleged negligence upon the testimony of Ortmeier, which Mendoza-Alvarez introduced. The judge did not indicate any reliance upon the testimony of the government witness. It is thus clear that the district judge ruled properly pursuant to Rule 41(b).

Mendoza-Alvarez's contention that the purported illegaility of the original stop left Ortmeier "without the cloak of police authority" is without merit. Any illegality of the original stop, in which Ortmeier did not participate, was irrelevant to the authority of Ortmeier as a Border Patrol agent, and thus his duty to arrest Mendoza-Alvarez as a suspected illegal alien or alien smuggler. The conduct of Ortmeier may thus be judged against that of the reasonable peace officer in his situation.

We now turn to the question whether the district court was clearly erroneous in finding that Ortmeier was justified in drawing his gun. We conclude that the court was not. The Federal Tort Claims Act provides that "[t]he United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. §2674. Liability is determined upon the basis of the law of the place where the act or omission complained of occurred. See, e.g., Thompson v. United States,

592 F.2d 1104, 1107 (9th Cir. 1979). In this case, both parties agree that California law controls.

In California, "'the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury.'" Vaughn v. Jonas, 31 Cal.2d 586, 600, 191 P.2d 432, 440 (1948); Boyer v. Waples, 206 Cal.App.2d 725, 727, 24 Cal.Rptr. 192, 194 (1962). Peace officers are subject to the same rule, except that a peace officer does not lose the right to self-defense "by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." Cal. Pen. Code § 835a (West 1970).

Ortmeier testified that he drew his gun for his self-protection only, and that he intended to use it only if he were attacked with another weapon. As stated above, the district judge found, among other things, that Ortmeier indeed drew his weapon "for reasons of self-protection," and that he reasonably did so. These findings are not clearly erroneous. See Fed. R. Civ. P. 52(a). We are not "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); accord, Smith v. James Irvine Foundation, 402 F.2d 772, 774 (9th Cir. 1968), cert. denied, 394 U.S. 1000 (1969).

Under the circumstances of this case, in which Mendoza-Alvarez, as a suspected illegal alien or alien smuggler, was resisting efforts to capture him, and appeared to be deliberately hiding his left side from Ortmeier, the court was not clearly erroneous in finding that it was reasonable for Ortmeier, who had a duty to apprehend Mendoza-Alvarez, to draw his weapon for self-protection in case the latter should prove to be armed. We also

cannot say that the district judge was clearly erroneous in finding that Ortmeier was not negligent in his handling of the weapon. Though it may have been somewhat dark, and though the terrain may have been rough, it was Mendoza-Alvarez who chose to attempt an escape, and it was he who chose the terrain in which to do so. Ortmeier, as the district judge observed, had a duty to apprehend Mendoza-Alvarez, and this duty was not lessened because Mendoza-Alvarez made it more difficult for him to do so. Moreover, Mendoza-Alvarez has failed to show how the possibility that Ortmeier may have been somewhat unfamiliar with some of the technical aspects of his weapon demonstrates that Ortmeier's handling of the weapon under the circumstances was unreasonable. Thus it is apparent that the district judge's findings are not clearly erroneous.

Mendoza-Alvarez's final contention is without merit. We see no basis upon which to fault the district court for refusal to apply the doctrine of res ipsa loquitur. The evidence did not reveal facts, even taken faborably to Mendoza-Alvarez, that would permit the doctrine to be applied.

AFFIRMED.

FILED
SEP 6 1979

Emil E. Melfi, Jr. Clerk
U.S. COURT OF APPEALS

HUFSTEDLER, Circuit Judge, dissenting:

The district court found that Ortmeier drew his gun "in the line of duty and for reasons of self-protection" and that he "acted reasonably in drawing his gun at this time and would have been derelict in his duties if he did not do so." As I read the applicable California law, Ortmeier was not justified in drawing his gun as he set off in pursuit of Mendoza-Alvarez.

Under the Federal Tort Claims Act, 28 U.S.C. §2674, liability is determined upon the basis of the law of the place where the act or omission complained of occurs. (E.g., Thorne v. United States (9th Cir. 1973) 479 F.2d 804. See also Hess v. United States (1960) 361 U.S. 314, 318.) In California, "the force that one may use in self-defense is that which reasonably appears necessary, in view of all the circumstances of the case, to prevent the impending injury." (Vaughn v. Jonas (1948) 31 Cal.2d 587, 600; Boyer v. Waples (1962) 206 Cal.App.2d 725.) Peace officers are subjected to the same rule, except that a peace officer does not lose his right to self-defense "by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." (Cal. Pen. Code § 835a.)

The Government argued, successfully below, that Ortmeier was justified in drawing his gun to effect the arrest of a fleeing felon. I am convinced

from reading the entire record that Ortmeier did not have probable cause to believe that the man he was pursuing had committed a felony. To be sure, the circumstances under which Ortmeier first observed the person later identified as Mendoza-Alvarez were highly suspicious and would surely have justified an investigatory stop. Even if the inferences could be stretched to find probable cause to believe that Mendoza-Alvarez had committed a felony, nothing in the record suggests that Mendoza-Alvarez was involved in something more than being an illegal alien or accompanying illegal aliens. Under the California law, police officers cannot use guns to effect an arrest of a felon unless the felony is of a violent variety. (Kortum v. Alkire (1977) 69 Cal.App. 3d 325, 333. See also Peterson v. City of Long Beach (1979) ___ Cal. 3d ___ [slip op'n May 16, 1979, case No. 30867].) A peace officer can exert no more or different force in preventing the escape of a fleeing felon than he can use to arrest a felon. (Kortum v. Alkire, supra; Peterson v. City of Long Beach, supra.) Ortmeier did not attempt to justify his gun-drawing on the basis of arresting a fleeing felon. Rather, as the majority acknowledges, he testified that he drew the weapon intending to use it only if he were attached with another weapon.

In short, neither the law of California nor the record supports the finding of the district court that Ortmeier was justified in drawing his gun "in the line of duty" and that he "would have been derelict in his duties if he did not do so."

I next turn to the question whether the district court's finding that Ortmeier was justified in drawing his gun for self-protection is supported by the record. When Ortmeier drew the gun, Mendoza-Alvarez was fleeing from him. According to

Ortmeier's own testimony, and disregarding the testimony of the other witnesses who cast Ortmeier's conduct in a much darker light, Mendoza-Alvarez was running away with his back toward Ortmeier when Ortmeier drew the weapon and left the Jeep.[1/]

The record does not support any inference or conclusion that Ortmeier was afraid that Mendoza-Alvarez would attack him when he drew the gun. Absolutely all there is in the record is Ortmeier's testimony that "if I would have seen his hands the first time I saw him and they would appear to be empty, I would never have drawn my gun." The "first time" Ortmeier saw Mendoza-Alvarez was when he was spotted behind the bush. Ortmeier did not testify that he ever believed that Mendoza-Alvarez had a weapon.[2/] I cannot find a basis in the record to support the district court's finding that Ortmeier drew the gun in self-defense.

That brings me to two separate questions relating to Ortmeier's handling of the gun: Was Ortmeier negligent when he drew the gun in the first place and, even if he were not then negligent, was he negligent in thereafter running in the dark over unknown territory with a drawn weapon? I believe that the answer to both questions is "Yes." A reasonable person would be required to recognize that he would create an unreasonable risk of harm to himself or to others in running over rocky terrain in the darkness with a drawn revolver in a ready position. Ortmeier's negligent conduct cannot be excused on the ground that Mendoza-Alvarez chose the terrain or the time of his flight. The majority's contrary view is a different way of stating contributory negligence, and contributory negligence is not a defense to the action. (Li v. Yellow Cab Co. of Calif. (1975) 13 Cal.3d 804.)

I would reverse and remand for a new trial.

s/s Sheila Hufstedler

FOOTNOTES:

1/ Mendoza-Alvarez testified that when Ortmeier caught up with him in the Jeep, he stopped and raised his hands. He testified that the shot hit him while he was standing in that fashion. He also testified that he did not see Ortmeier stumble.

2/ It is extremely difficult to reconcile Ortmeier's version of the events with the physical facts concerning the nature and placement of Mendoza-Alvarez' gunshot wounds and powder burns on his face indicating that he was shot at extremely close range. Nevertheless, I fully recognize that questions of credibility rest solely in the district court, and I therefore accept as true Ortmeier's testimony of the events.

APPENDIX B

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FELIPE MENDOZA ALVAREZ, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	Civil No. 75-352-S FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-2680, as amended. Pursuant to 28 U.S.C. §2402, this action was tried by the court without a jury on May 6, 7, and 11, 1976. Upon consideration of all the evidence, the court hereby

makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. On May 5, 1973, Border Patrol Agent Frank Ortmeier was Acting Station Supervisor, El Centro, California.

2. At approximately 11:45 p.m., Agent Ortmeier received a call that a vehicle containing illegal aliens had been stopped on Highway S-22 by Border Patrol agents. At the time of the stop, all the aliens fled into the desert.

3. Agent Ortmeier proceeded from El Centro to Highway S-22, arriving at approximately 12:30 a.m.

4. Agent Ortmeier, along with other Border Patrol agents, began an intensive search in the desert for the aliens. The initial search lasted approximately three hours and ended when a group of three aliens were taken into custody by Ortmeier.

5. Agent Ortmeier and the other agents began to search the area for the remaining aliens. Some two hours later, Agent Ortmeier found five individuals hidden under a large bush.

6. Agent Ortmeier was dressed in a uniform of the Border Patrol and the vehicle had the Border Patrol insignia, along with the lights on top of the vehicle.

7. Agent Ortmeier spoke to the individuals in both Spanish and English indicating that he was an Immigration officer and they should surrender themselves.

8. Four of the individual remained; however, one individual, who was subsequently identified as the plaintiff, ran.

9. At this time, Ortmeier was alone and radioed for help. He was instructed by his supervisor to proceed after the lone individual.

10. The second stop occurred at approximately 5:15 a.m. The sun was not up and semi-darkness prevailed.

11. Agent Ortmeier proceeded after the individual over rocky, rough terrain into the desert.

12. There were no other individuals or homes in the immediate area.

13. Plaintiff Alvarez attempted escape by running around various brushes.

14. Agent Ortmeier was unable to see the left side of Alvarez. The plaintiff appeared to make a concerted effort to keep the left side from the vision of the Border Patrol agent.

15. At approximately 100 yards from the area where the four other individuals were spotted, Ortmeier exited from his vehicle. Plaintiff Alvarez continued to run and to keep his left side out of vision. Agent Ortmeier indicated to the plaintiff that he was an Immigration officer when he alighted from the vehicle.

16. Ortmeier was still alone and had no anticipation of immediate help.

17. Ortmeier did not know if plaintiff was armed. Four other individuals who were with the

plaintiff at the time were more or less 100 yards away.

18. Agent Ortmeier, in the line of duty and for reasons of self-protection, pulled his revolver in a ready position.

19. Agent Ortmeier continued to chase after plaintiff Alvarez when he stumbled and the gun discharged. The plaintiff was struck on the right side of his face by the discharged bullet causing substantial damage to his face and lower jaw.

20. Ortmeier followed plaintiff into an area not of his own choosing, but that area which was chosen by the plaintiff.

21. Ortmeier never saw the left side of plaintiff during the entire attempted apprehension.

22. Agent Ortmeier acted reasonably in drawing his gun at this time and would have been derelict in his duties if he did not do so.

23. Plaintiff's testimony was not consistent with his own deposition in many respects, nor was his testimony consistent with that of Tomas De La Torres' deposition which was submitted to the court.

24. De La Torres is not worthy of belief given the testimony of plaintiff, Agent Ortmeier and other inconsistencies.

25. The plaintiff was smuggling aliens at the time of the incident.

26. Plaintiff is not credible when he denies knowledge of illegal status of the others, considering the various circumstances including the 300-mile

drive from his hometown and his flight from officers on two occasions.

27. Plaintiff had to be aware that injuries could have occurred under these circumstances.

28. Plaintiff was resisting arrest at the time he was injured.

29. Ortmeier had a split second in which to react.

30. The discharge of the gun was by accident without any negligence on the part of Agent Ortmeier.

CONCLUSIONS OF LAW

This court has jurisdiction of the cause and parties hereto under 28 U.S.C. §§1326(b), 2671-2680, as amended.

Plaintiff has the burden to prove: (1) the existence of a duty on the part of the defendants; (2) the failure of the defendants to perform that duty; and (3) injury or damage to the plaintiff arising from such failure. Means v. Southern R.R. Co., 144 Cal. 473 (1904). Absence of or failure to prove any one of them is fatal to recovery. Hackleberry v. Sherlock Land & Cattle Co., 39 Cal.App. 764 (1919).

Plaintiff failed to meet this burden of duty, regardless of whether plaintiff was a fleeing felon or an innocent bystander.

The courts must not too strictly limit what a federal officer should do in carrying out a dangerous duty imposed on him here by virtue of

his office. United States v. Folk, 199 F. 2d 889 (4th Cir. 1952).

In a case tried without a jury, the trial court is not required to consider evidence in light most favorable to the plaintiff in determining whether it should grant a motion to dismiss at the completion of plaintiff's case under Federal Rules of Civil Procedure 41(b). Ellis v. Carter, 328 F. 2d 573 (9th Cir. 1964); Woods v. North American Rockwell Corp., 480 F. 2d 664 (10th Cir. 1973).

From the record, this court is convinced the evidence preponderate against the plaintiff whether the plaintiff was a fleeing felon or an innocent bystander.

Border Patrol Agent Ortmeier acted reasonably under the circumstances of this case.

ACCORDINGLY, the court directs that an appropriate judgment be entered in favor of the defendants.

DATED: _____

_____
United States District Judge

PRESENTED BY:

TERRY J. KNOEPP
United States Attorney

_____
DONALD F. SHANAHAN
Assistant U. S. Attorney
Attorneys for Defendants

APPROVED AS TO FORM:

_____
MANUEL LOPEZ
Attorney for Plaintiff

Supreme Court, U. S.
FILED
APR 28 1980
MICHAEL RODAK, JR., CLERK

No. 79-1473

In the Supreme Court of the United States

OCTOBER TERM, 1979

FELIPE MENDOZA ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1473

FELIPE MENDOZA ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The petition for a writ of certiorari in this case was filed out of time. The order of the court of appeals denying petitioner's petition for rehearing was entered on November 5, 1979. The time for filing a petition for a writ of certiorari was not extended. Accordingly, the period provided by 28 U.S.C. 2101(c) for filing a petition in this civil case expired on February 3, 1980. The petition was filed on March 20, 1980.

Petitioner apparently contends (Pet. 2) that the 90-day period provided in 28 U.S.C. 2101(c) did not begin until December 20, 1979, when his motion to recall the court of appeals' mandate was denied. This contention is erroneous. A motion to recall the mandate may be filed at any time, even years after the entry of judgment. See

generally C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3938 (1977). Acceptance of petitioner's contention therefore would effectively repeal Section 2101(c). Moreover, even if petitioner's method of computation were proper, the petition would still be untimely because it was filed 91 days after the denial of the motion.

The time limit in 28 U.S.C. 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980